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Bandar Nusajaya Development Sdn Bhd v Tenaga Nasional Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–2968–11 OF 2011
ALIZATUL KHAIR, ROHANA YUSUF AND TENGKU MAIMUN JJCA
14 MAY 2014

Civil Procedure — Judicial review — Certiorari — Application to quash decision of state authority — Transmission line project over lands — Grievance over assessment for encroachment of land by land administrator — Increase in award by state authority — Application for judicial review against state authority's decision in High Court — Decision reversed by Court of Appeal — Whether decision made under s 16(2) of the Electricity Supply Act 1990 final

The appellant was the owner of 26 parcels of land in Johor ('the said lots') and in 1996, TNB proposed a project to the appellant which involved erecting transmission towers and leading cables on the said lots. Pursuant to an inquiry held under s 16(1) of the Electricity Supply Act 1990 ('the Act'), the land administrator assessed the compensation to be paid by the respondent to the appellant at RM11,426,555.70 ('the compensation'). Aggrieved by the assessment, the appellant appealed to the state authority which in turn made a decision directing the respondent to pay RM34,522,099 to the appellant instead of the compensation ('the first decision'). This caused the respondent to write to the Menteri Besar of Johor requesting the latter to review the first decision. The land administrator informed the respondent that the state authority had acceded to their 'appeal' and handed down a decision which increased the compensation by a mere 30% and directed the appellant to pay an additional compensation of RM2,735,613 ('the second decision'). The appellant's representative handed to the respondent a letter from the land administrator stating that the state authority's first decision was final and TNB was ordered to pay the additional compensation ('the third decision'). The respondent filed their application for judicial review to the High Court and applied for an order of certiorari to quash the third decision and argued that the state authority's decision was final. The application was allowed. Hence, the present appeal. The appellant contended that the first decision was final and any subsequent decision that was inconsistent with the first decision was therefore null and void.

Held, allowing the appeal with costs:

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(1) The decision of the state authority under s 16(2) of the Act was final in that there was no power on the part of the state authority to review its own decision after it had made its decision (see para 20).

(2) The respondent's contention that the second decision was valid as it had not been challenged and quashed was clearly untenable. On the contrary as the state authority was not empowered to make the second decision, the second decision was null and void. Even if it could be argued that the state authority's decision under s 16(2) of the Act could be challenged by way of judicial review, the respondent did not take any step to do so but chose instead to appeal against the first decision to the Menteri Besar, a procedure not provided for under the Act (see para 22).

(3) The High Court judge fell into error in allowing the judicial review to quash the third decision as there was no error of law committed by the state authority when it merely confirmed the first decision and annulled the second decision (see para 23).

(4) The parties had already ventilated their respective arguments at the inquiry stage and the respondent had up to now failed to show any new evidence it could have presented, the respondent's argument that they were not heard by the state authority could not be sustained (see para 32).

[Bahasa Malaysia summary

Perayu adalah pemilik 26 bidang tanah di Johor ('lot-lot tersebut') dan pada tahun 1996, TNB mencadangkan projek kepada perayu yang mana melibatkan pembinaan menara penyiaran dan kabel utama atas lot-lot tersebut. Berikutan kepada siasatan yang dijalankan di bawah s 16(1) Akta Bekalan Elektrik 1990 ('Akta'), pentadbir tanah menilai pampasan yang dibayar oleh responden kepada perayu pada nilai RM11,426,555.70 ('pampasan tersebut'). Tidak berpuas hati dengan penilaian tersebut, perayu merayu kepada pihak berkuasa yang mana sebaliknya membuat keputusan mengarahkan responden untuk membayar RM34,522,099 kepada perayu dan bukan pampasan ('keputusan pertama'). Ini menyebabkan responden menulis kepada Menteri Besar Johor memohon Menteri untuk menyemak keputusan pertama tersebut. Pentadbir tanah memberitahu responden bahawa pihak berkuasa telah bersetuju kepada 'appeal' mereka dan memberikan keputusan yang menambahkan pampasan cuma sebanyak 30% dan mengarahkan perayu membayar pampasan tambahan sebanyak RM2,735,613 ('keputusan kedua'). Wakil perayu menyerahkan responden surat daripada pentadbir tanah yang menyatakan bahawa keputusan pertama pihak berkuasa adalah muktamad dan TNB diperintahkan untuk membayar pampasan tambahan ('keputusan ketiga'). Responden memfailkan permohonan untuk semakan kehakiman kepada Mahkamah Tinggi dan memohon untuk perintah certiorari untuk membatalkan keputusan ketiga dan berhujah bahawa keputusan pihak berkuasa adalah muktamad. Permohonan dibenarkan. Maka rayuan ini.

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Perayu berhujah bahawa keputusan pertama adalah muktamad dan apa-apa keputusan kemudiannya yang tidak konsisten dengan keputusan pertama oleh itu adalah terbatal dan tak sah.

Diputuskan, membenarkan rayuan dengan kos:

(1) Keputusan pihak berkuasa di bawah s 16(2) Akta adalah muktamad di mana tiada kuasa bagi pihak pihak berkuasa untuk menyemak keputusannya selepas ia telah membuat keputusannya (lihat perenggan 20).

(2) Hujahan responden bahawa keputusan kedua adalah sah memandangkan ia tidak dicabar dan dibatalkan adalah jelas tidak dapat dipertahankan. Bertentangan memandangkan Pihak berkuasa tidak diberikan kuasa untuk membuat keputusan kedua, keputusan kedua adalah terbatal dan tak sah. Walaupun jika ia boleh dihujahkan bahawa keputusan pihak berkuasa di bawah s 16(2) Akta boleh dicabar melalui semakan kehakiman, responden tidak mengambil apa-apa langkah untuk berbuat sedemikian tetapi sebalik memilih untuk merayu terhadap keputusan pertama kepada Menteri Besar, prosedur yang tidak diperuntukkan di bawah Akta (lihat perenggan 22).

(3) Hakim Mahkamah Tinggi tersalah arah dalam membenarkan semakan kehakiman untuk membatalkan keputusan ketiga memandangkan tiada kesilapan undang-undang yang dilakukan oleh pihak berkuasa apabila ia hanya mengesahkan keputusan pertama dan membatalkan keputusan kedua (lihat perenggan 23).

(4) Pihak-pihak telah menyuarakan penghujahan masing-masing pada peringkat siasatan dan responden telah sehingga sekarang gagal untuk menunjukkan apa-apa keterangan baru yang boleh dikemukakannya, penghujahan responden bahawa mereka tidak didengar oleh pihak berkuasa tidak dapat dipertahankan (lihat perenggan 32).]

Notes

For cases on certiorari, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5326–5330.

Cases referred to

Ismail bin Abdullah v Tenaga Nasional Bhd [2010] MLJU 1616; [2011] 3 CLJ 770, CA (refd)

Sarawak Electricity Supply Corporation v Wong Ah Suan [1980] 1 MLJ 65, FC (refd)

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Legislation referred to

Electricity Supply Act 1990 s 16(1), (2)

Appeal from: Application for judicial review No 25–84 of 2010 (High Court, Johor Bharu)

Collin Sequerah (MW Lim with him) (Zain & Co) for the appellant.
Azlan Sulaiman (Azmi & Associates) for the respondent.

Alizatul Khair JCA (delivering judgment of the court):

[1] This appeal stems from the decision of the learned High Court judge in Johor Bahru who had allowed the respondent's (ie TNB) application for an order of certiorari to quash the decision of the land administrator Johor Bahru contained in letter dated 23 November 2010, which had, inter alia, ordered or directed the respondent to pay the appellant (Bandar Nusajaya Development Sdn Bhd) the compensation sum of RM34,522,099.

BACKGROUND FACTS

[2] As pointed out by the learned judge in her decision (see pp 37–39 of the record of appeal (RA) Jld 1, Bah A), the state authority in this case appeared to have made three decisions which, to quote the learned judge were as follows:

(a) R/M Bil 307/2002 dated 6 February 2002 (P4 in L4) wherein the SA had acceded to the appeal of the second respondent and increased the Land Administrator's (LA) award of RM11.4m to RM34.5m (first decision).

(b) R/M Bil 539/2008 dated 2 April 2008 (P8 in L15) wherein the SA had similarly acceded to the appeal of the applicant and increased the LA's award by only 30% (second decision).

(c) R/M 1351/2009 dated 26 October 2009 (P7 in L4) wherein the SA had reverted to its first decision and declared the first decision to be MUKTAMAD (final) and that the second decision was 'TIDAK TERPAKAI dan TERBATAL' (third decision).

[3] The facts giving rise to the aforesaid decisions are set out below.

[4] The appellant was the owner of 26 parcels of land in Johor ('the said lots').

[5] In 1996, the respondent TNB proposed the following project:

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[6] 'Projek Talian Penghantaran Elektrik dari PMU Gelang Patah Ke PMU Perling (2 rantai) dan dari PMU Gelang Patah ke PMU Tg. Kupang (3 rantai), Johor' ('the said project'). The said project involved the respondent entering into, inter alia, the said lots and erecting transmission towers and leading cables through it under the Electricity Supply Act 1990 ('the said Act').

[7] Pursuant to an enquiry held under s 16(1) of the said Act, the land administrator on 17 October 1995 and 17 June 1997 assessed the compensation to be paid by the respondent to the appellant at RM11,426,555.70 ('the said compensation'). Aggrieved by the land administrator's assessment the appellant appealed to the state authority under s 16(2) of the said Act.

[8] Following the said appeal, the state authority made a decision on 6 February 2002, directing the respondent to pay RM34,522,099 to the appellant instead of the said compensation of RM11,426,555.75 (ie the first decision).

[9] The respondent then wrote to the Menteri Besar of Johor on 14 August 2002 requesting the latter to review the first decision. Vide letter dated 25 June 2008 the land administrator informed the respondent that the state authority had acceded to their 'appeal' and handed down a decision dated 2 April 2008, which increased the said compensation by a mere 30% and directed the appellant to pay an additional compensation of RM2,735,613 only (ie the second decision).

[10] On 8 October 2010, a representative of the appellant, one En Muntaza bin Mohd Zain handed to the respondent a letter from the land administrator dated 23 October 2010 addressed to the respondent (exh P7) stating that the state authority's first decision was final and 'memerintah/mengarahkan supaya TNB membayar Pampasan Tambahan (that is the RM34,522,099.00 in the first decision) kepada Responden Ke-2 ...' (ie the third decision).

[11] In other words as stated by the learned judge 'the state authority reverted to its first decision and declared the first decision to be *MUKTAMAD* (final) and that the second decision was 'TIDAK TERPAKAI dan TERBATAL' in accordance with the state authority's decision dated 26 October 2009 R/M 1351/2009'.

[12] Following therefrom the respondent filed their application for judicial review to quash the said third decision and which is now the subject matter of this appeal.

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OUR DECISION

[13] We had, after hearing submissions from parties allowed the respondent's appeal with costs and our reasons appear below.

[14] The crux of the appellant's appeal was that the State Authority's decision under s 16(2) of the said Act is final. Following that the appellant contended that the first decision was final and any subsequent decision that was inconsistent with the first decision was therefore null and void. Thus the third decision which affirmed the first decision was wrongly quashed by the High Court.

[15] Section 16 of the said Act provides as follows:

> (1) The amount of compensation, if any, payable under ss 11 or 13 shall be assessed by the District Land Administrator after such enquiry as he shall deem sufficient. The assessment shall be substantially in the form set out in the Third Schedule: Provided further that no compensation shall be payable by the licensee in respect of any tree within fifty feet of the centre line of any road constructed or maintained by the State Government or by any local authority unless it is proved that the tree was in existence prior to the construction of the road.
>
> (2) A*ny person aggrieved with the District Land Administrator's assessment may within twenty-one days after the assessment appeal to the State Authority whose decision shall be final.* (Emphasis added.)

[16] Learned counsel for the appellant relied on the Court of Appeal decision in the case of *Ismail bin Abdullah v Tenaga Nasional Bhd* [2010] MLJU 1616; [2011] 3 CLJ 770 (*Ismail Abdullah*'s case) to support their contention that a decision under s 16(2) of the said Act is final. In this case which also involved an appeal under s 16(2), the Court of Appeal held as follows at headnote (1):

> The compensation as reviewed and awarded by the state authority — on appeal from the award of the district land administrator — was final and unappealable. This was clear from the mandatory words 'shall be final' in s 16(2) ESA. The learned JC should have dismissed the respondent's appeal and affirmed the decision of the deputy registrar granting the appellant summary judgment — bearing in mind the purport and intent of s 16(2) ESA.

[17] The Court of Appeal further held the following:

> In holding that the award by the MMK was excessive, the learned JG was indirectly reviewing the decision of the MMK. In our judgment, the learned JC has no power to do so. This is another instance where His Lordship erred ... The learned JC relied on the valuation report of the respondent and held that the award by the MMK was

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A excessive. But the Electricity Supply Act 1990 does not make any provision for an award by the MMK to be challenged since the MMK's decision is final.

... Here, we have s 16(2) of the Electricity Supply Act 1990 which states that the decision of the State Authority shall be final and effect must be given to it. Public policy too demands that finality to the decision of the State Authority be recognised.

B

[18] In the aforesaid case, the appellant had appealed against the compensation sums ordered by the district land administrator ('DLA') to the Majlis Mesyuarat Kerajaan ('MMK') (the state authority) pursuant to s 16(2) of the said Act. The MMK decided in favour of the appellant and increased the C compensation ordered by DLA from RM10,124 and RM15,310.00 for the two affected lots to RM247,808 and RM557,108 respectively totaling RM804,916. The respondent (TNB) refused to pay the said sum of RM804,916 leading the appellant to file a suit to recover the said sum. D Summary judgment was granted by the deputy registrar of the High Court but this decision was reversed on appeal to the judicial commissioner hence the appeal before the Court of Appeal.

[19] Learned counsel for the respondent pointed out that the case of Ismail E Abdullah was overturned by the Federal Court. However, since only the sealed order of the Federal Court was made available to us we were not in a position to ascertain the ground(s) on which the appeal was allowed, in particular whether the interpretation of the word 'shall' in s 16(2) of the said Act propounded by the Court of Appeal was disturbed.

F

[20] We agree with the appellant that the decision of the state authority under s 16(2) of the said Act is final in that there is no power on the part of the state authority to review its own decision after it had made its decision under G the said sub-section. As said by the Court of Appeal in *Ismail Abdullah*'s case:

> The compensation as reviewed and awarded by the state authority — on appeal from the award of the district land administrator — was final and unappealable. This was clear from the mandatory words 'shall be final' in s 16(2) ESA.

H

[21] In fact the learned judge herself recognised that the state authority was not empowered under the said Act to review its own decision when she made the following observation:

> Furthermore, s 16(2) does not empower the SA to entertain appeal after appeal — I otherwise it will render the mandatory provision that 'its decision shall be final' nugatory and of not effect.

[22] Thus the respondent's contention that the second decision was valid as it had not been challenged and quashed was clearly untenable. On the contrary

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as the state authority was not empowered to make the second decision, the second decision was by virtue thereof null and void. Even if it can be argued that the state authority's decision under s 16(2) of the said Act can be challenged by way of judicial review, the respondent did not take any step to do so but chose instead to appeal (against the first decision) to the Menteri Besar, a procedure not provided for under the said Act.

[23] In our view, the learned judge fell into error when she allowed the judicial review to quash the third decision as there was no error of law committed by the state authority when it merely confirmed the first decision and annulled the second decision.

[24] In her judgment the learned judge had allowed the respondent's application on the basis that as the first decision did not follow an appeal by the appellant, the second decision stood as the only legitimate decision. However as correctly submitted by the appellant, the above finding is flawed because it was never disputed that the appellant had made an appeal to the state authority under s 16(2) of the said Act.

[25] This can be seen from the admission of the respondent in paras 9 and 10 of the affidavit in support of their application for judicial review which for convenience is reproduced below:

> 9 Saya mengatakan bahawa tanpa pengetahuan atau notis kepada Pemohon, selaras dengan Seksyen 16(2) Akta Bekalan Elektrik, 1990 Responden Ke-2 (the appellant herein) telah merayu kepada Pihak Berkuasa Negeri terhadap taksiran Pampasan Asal oleh Responden Pertama ('Rayuan Responden Ke-2').
>
> 10 Saya mengatakan bahawa, melalui satu surat bertarikh 25.03.2002, Pemohon telah dimaklumkan oleh Responden Pertama, antara lain, bahawa Majlis Mesyuarat Kerajaan Negeri Johor telah membuat keputusan ke atas Rayuan Responden ke-2, iaitu memutuskan supaya Pemohon membayar pampasan berjumlah RM34,522,099.00 ('Pampasan Tambahan') kepada Responden K2-2 ('Keputusan Asal MMKHJ'). (see p 66 of the Record of Appeal (ROA), *Jilid* 2 Bah B)

[26] The learned judge also appeared to find issue with the time gap of nearly seven years from the land administrator's award to the first decision.

[27] However as pointed out by the appellant, this had never been a contention by either the land administrator or the state authority, and as such the seven years gap is irrelevant. The respondent had also not raised this seven years gap as an issue.

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[28] The learned judge further took issue with the respondent's allegation that they did not receive notice of the appellant's appeal which led to the first decision. This was what the learned judge said:

> It is clear from this affidavit that the SA had made the first decision without reference or notice to the applicant, the decision which has gravely prejudiced the applicant as it resulted in a 300% increase of the award. By not giving the applicant a chance to be heard, the SA had infringed the rules of natural justice.

[29] Firstly, this was factually inaccurate, as evidenced by exh KJ1 (at p 216 of the ROA *Jilid* 4) which is a letter from the land administrator to the respondent dated 8 January 2001 inviting the respondent to put forward evidence and/or a valuation for consideration in the appellant's appeal to the state authority.

[30] Secondly, we agree with learned counsel for the appellant that this issue was raised as an afterthought as it was not raised in the respondent's letter to the Menteri Besar dated 14 August 2002 (exh P5) (see p 163 of the ROA *Jilid* 3).

[31] We also agree with the appellant's submission that (a) the representatives of both parties had already attended the initial inquiry before the land administrator and were given a chance to be heard and (b) the respondent had not mentioned nor shown any new evidence or material that it wished to rely on in the valuation of the lots. The case relied on by the appellant, ie the Federal Court decision of *Sarawak Electricity Supply Corporation v Wong Ah Suan* [1980] 1 MLJ 65 lend credence to the appellant's contention. In this case the *Sarawak Electricity Corporation* had appealed to the governor-in-council for the licence to supply electricity to an area which formed part of an area to which a prior licensee had exclusive privilege of supplying electricity to. The governor-in-council granted the licence to the corporation after considering the material evidence including the correspondence between the corporation and the existing licensee. The licensee claimed he had not been given the right to be heard before the governor-in-council made its decision. The licensee failed in the Federal Court which held to the following effect:

> For the observation of the audi alterem partem rule a number of authorities has laid down that so long as an adequate opportunity is given to the affected party to make any relevant statement he may want to make or to answer any statement to his prejudice, no particular form of procedure, where the relevant statute, as in this case, does not prescribe any special form of hearing, needs to be followed. The substance and not the form is the important thing.
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> ... if he had been asked what further representations, if any, he had to make, could he have said anything more... If he had nothing he could possibly add to what had

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already been said for him, the conclusion is inevitable that the governor-in-council then had all the material evidence before him to enable him to come to a fair and proper decision.

[32] In our view as the parties had already ventilated their respective arguments at the inquiry stage and the respondent had up to now failed to show any new evidence it could have presented, the respondent's argument that they were not heard by the state authority could not be sustained.

[33] For the above reasons we found that the learned judge had erred in law and in fact when she allowed the application for judicial review by the respondent. The appeal was accordingly allowed with costs.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor